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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE NATIONAL ASSOCIATION OF
HOME BUILDERS OF THE UNITED STATES AND THE
BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION,
Petitioners,

vs.

CITY OF LOS ANGELES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES K. HAHN
City Attorney
CLAUDIA MCGEE HENRY
Senior Assistant City Attorney
ANTHONY SAUL ALPERIN
Assistant City Attorney
Counsel of Record
SHARON SEIDORF CARDENAS
Assistant City Attorney

LOS ANGELES CITY ATTORNEY'S OFFICE

200 North Main Street
Room 1700, City Hall East
Los Angeles, California 90012-4130
(213) 485-4510

Attorneys for Respondent

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

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QUESTION PRESENTED

Does a statute of limitations bar a facial challenge to an ordinance on the basis that the adoption of the ordinance results in a taking of property without compensation when the relief sought is declaratory and injunctive?

PARTIES TO THE PROCEEDINGS

The identities of the petitioners in this Court are set forth in the Petition for a Writ of Certiorari. The respondent is the City of Los Angeles, a municipal corporation in the State of California.

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OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is unreported. The memorandum opinion of that court is set forth as Appendix A to the Petition for Writ of Certiorari (Petition).

JURISDICTION

Respondent does not disagree with the statement of jurisdiction set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent does not disagree with the statement of constitutional and statutory provisions at issue as set forth in the Petition.

STATEMENT OF THE CASE

In 1962, the City of Los Angeles enacted Los Angeles Municipal Code (LAMC) § 12.37. That ordinance provides that, with certain exceptions, buildings may not be constructed or enlarged on a lot in commercial, industrial and most multi-family residential zones if the lot abuts a major or secondary highway or collector street, unless the half of the highway or street adjacent to the lot is dedicated and improved to meet certain uniform standards. In lieu of making a dedication and constructing the street improvements prior to obtaining a building permit, a property owner is allowed to provide assurances to the City Engineer that the dedication and/or improvements will be

made in the future. These requirements do not apply to buildings in any single family zone, in some multi-family zones or along "local" streets. The ordinance allows for exemptions from the requirements in order to prevent unnecessary hardships.

In September 1995, the petitioners filed a complaint in the District Court for the Central District of California, contending that LAMC § 12.37 results in a taking of their members' property without compensation because the dedication and improvement standards of the ordinance do not meet the requirements of *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The complaint attempts to state a facial, not an as-applied, challenge to the ordinance. The District Court granted the respondent's motion to dismiss without prejudice. Upon petitioners' filing an amended complaint, the respondent sought a dismissal of that pleading for failure to state a claim on which relief could be granted, and the District Court granted that motion with prejudice. The basis for that court's rulings was that the petitioners did not have standing to bring the action.

A majority of the Court of Appeals affirmed but on a different ground than that stated by the District Court, namely that the applicable statute of limitations bars petitioners' facial challenge.[1] One member of the panel

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[1] The Court of Appeals did not "quickly [find] that the NAHB and the BILD Foundation had standing," as asserted by the petitioners. See Petition at 3-4. Rather, the court held that "plaintiffs' allegations concerning standing are sufficient to overcome a Rule 12(b)(6) motion," stating further that ". . . defendants would not be precluded from raising the standing issue by summary judgment motion or through a preliminary hearing." Petition at A-3. Thus, the

concurred in the judgment, stating that she did so "because I do not believe that a facial challenge to this ordinance on a theory that it conflicts with *Dolan* is possible to evaluate absent a factual record showing how the ordinance is applied in light of *Dolan*." Petition at A-6.

REASONS WHY THE WRIT SHOULD BE DENIED

This case does not meet the criteria for the issuance of a writ of certiorari as set forth in Rule 10 of the Rules of this Court, and the Petition should be denied. The decision of the Ninth Circuit Court of Appeals does not conflict either with the decisions of this Court or of other circuits of the Courts of Appeals.

Consistent with the purposes and effect of any statute of limitations, the Ninth Circuit decision below shields the City's ordinance from facial challenges. It does not, however, shield the City's ordinance from as-applied challenges, and a property owner who believes that the dedication and/or improvement requirements imposed as conditions of a discretionary permit do not meet the criteria of *Dolan*, *supra*, can file such a challenge at the time the exaction is imposed. Petitioners' challenge, however, was solely a facial attack on the ordinance and thus properly subject to the bar of the statute of limitations.

Court of Appeals made a determination concerning Petitioners' standing only with respect to the sufficiency of their pleading. ("Having determined that the associations have standing, at least at this stage of the litigation, we examine whether the plaintiffs' complaint is barred by the statute of limitations." *Id.*)

A. The Opinion Of The Court Of Appeals Does Not Conflict With Relevant Decisions Of This Court.

Petitioners cite a series of decisions of this Court striking down a variety of statutes on the ground that the statute involved in each case violated constitutional rights of the parties bringing the actions, even though the challenges were filed many years after the enactment of the statutes involved. Petitioners assert that these decisions support their contention that a facial constitutional challenge to a statute or ordinance, seeking only declaratory and/or injunctive relief, is never barred by a statute of limitations. These decisions do not support that assertion.

A taking of property can occur only upon the enactment of a statute or ordinance or at the time the statute or ordinance is actually applied to a particular parcel of real property.[2] As the Ninth Circuit opinion points out, the petitioners here "allege that the 'mere enactment' of this allegedly unconstitutional ordinance is a taking because it affects property values and discourages development." Petition at A-4. Significantly, the petitioners do not allege any particular instance in which any of their members were

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[2] A challenge based on *Dolan* can be brought only at the time the government actually imposes an exaction as a condition of a discretionary permit. This is so because the standard for reviewing the governmental decision required by *Dolan* involves consideration of the relationship ("rough proportionality") between a particular permit condition and the impacts of the development project which justify the exaction: "[T]he city must make some sort of *individualized* determination that the required dedication is related both in nature and extent to the impact of the proposed development." 512 U.S. at 391 (emphasis added).

denied a permit or were required to dedicate property or make street improvements as a result of the ordinance. Their attack on the ordinance is therefore purely facial and hypothetical.

The cases cited by the petitioners all arose in a decidedly different context. Each involves either a continuing violation or an as-applied challenge to the statute involved. *Brown v. Board of Education*, 347 U.S. 483 (1954) did not arise in a hypothetical context. Rather, African-American school children, who were not allowed to attend integrated schools, sought to "enjoin enforcement" of the Kansas statute permitting segregated schools. *Id.* at 486-488 & n.1. The wrong they sought to correct was not the enactment of the statute but its enforcement.

Each of the other cases on which petitioners rely involved either the actual application of the challenged statute to the plaintiffs or a situation where the existence of the statute constituted a continuing constitutional violation. *Roe v. Wade*, 410 U.S. 113 (1973) (continuing threat of prosecution inhibits persons from seeking or obtaining abortions); *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (citizens who could not afford to pay a poll tax were not allowed to vote);[3] *Baker v. Carr*, 369 U.S. 186, 192 (1962) ("It is primarily the continued application of the 1901 Apportionment Act to this shifted and enlarged voting population which gives rise to the

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[3] The underlying facts of the case are not recited in the Court's opinion but are rather contained in the district court's decision. *Harper v. Virginia State Board of Elections*, 240 F.Supp. 270, 271 (E.D.Va. 1964).

present controversy."); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963) (the method of electing legislative representatives had a concrete effect on every election held); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 147-148 (1963) (involved the application of a statute through actual deportation proceedings).

B. There Is No Conflict Among The Circuit Courts of Appeals Concerning The Application Of The Statute Of Limitations To Facial Challenges Asserting A Taking Of Property Without Compensation.

It is well-settled in the Ninth Circuit that the statute of limitations bars an untimely facial challenge to an ordinance on the ground that the enactment constitutes a taking of property without compensation and that the limitations period begins to run from the date the ordinance is enacted. Moreover, the approach of the Ninth Circuit on this issue does not conflict with decisions of other circuits.

The Ninth Circuit has repeatedly held that the bar of a statute of limitations is applicable to a facial challenge to a "takings" claim and that the limitations period runs from enactment of the ordinance. *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991); *Azul Pacifico v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081; *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), *cert. denied*, 503 U.S. 1093 (1993). In *Levald, supra*, that court cogently expressed the compelling reasons why this is so in the following terms:

> "Levald argues that because in other contexts the Supreme Court has allowed challenges to statutes long after they were enacted, Levald should be allowed to bring an action challenging the enactment of a statute as a taking without just compensation at any point. This argument misapprehends the differences between a statute that effects a taking and a statute that inflicts some other kind of harm. In other contexts, the harm inflicted by the statute is continuing, or does not occur until the statute is enforced - in other words, until it is applied. In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed. Thus, it is not inconsistent to say that different rules adhere in the facial takings context and other contexts." 998 F.2d at 688.

Contrary to petitioners' assertion to the contrary,[4] the same approach has been followed in both the Fourth and Sixth Circuits. In *National Advertising Company v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), the Fourth Circuit applied the statute of limitations to a claim that a city ordinance restricting off-premises outdoor advertising signs resulted in a taking. Contending that it suffered no injury until the expiration of an amortization period (after which

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[4] Petitioners' quote from *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.2d 516, 522 (6th Cir. 1997) on page 8 of their Petition is taken from the court's discussion of Kuhnle's claim for deprivation of a liberty interest (substantive due process), not the court's discussion of the takings claim.

the ordinance required removal of its signs), National argued that the limitations period ran from the end of the amortization period rather than the adoption of the ordinance. The Fourth Circuit rejected that argument, stating:

> "National's cause of action arose when the ordinance was enacted because it was then, if at all, that National suffered the regulatory interference with the primary uses of its property. . . . [¶][¶] We hold only that the injury suffered by National, an injury that might or might not rise to the level of a taking, occurred upon enactment of the ordinance at issue." *Id.* at 1163-1164.

The Sixth Circuit's approach accords with that of the Fourth and Ninth Circuits. In *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516 (6th Cir. 1997), a trucking firm challenged a county resolution that prohibited the use of certain streets for truck traffic. The firm filed an action claiming, *inter alia*, that the resolution "constituted an invalid taking of property without just compensation." *Id.* at 518-519. That action was filed more than two years after the adoption of the resolution but less than two years after the county ceased enforcing the restriction (two years being the applicable limitations period). In an attempt to avoid the bar of the statute of limitations, the firm argued that enforcement of the resolution was a "continuing violation" and that the limitations period did not run until the date the county no longer enforced the restriction. *Id.* at 520. The court rejected that argument. Citing *Levald*, *supra*, the court stated that if the resolution "did, in fact, 'take' any property interests . . . that taking occurred when the resolution was enacted." *Id.* at 521. Therefore, treating the

claim as a facial challenge, the court held that the statute of limitations ran from the date of enactment and that the takings claim was time barred. *Id.*

C. The Statute Of Limitations Bars Relief Even Though Petitioners Seek Declaratory And Injunctive Relief Rather Than Damages.

The petitioners contend that, because they seek declaratory and injunctive relief rather than damages, the statute of limitations does not apply to their facial challenge. To the contrary, it is well-settled that the nature of the remedy sought does not preclude the application of the statute of limitations. Where an action for damages, as well as for declaratory and injunctive relief, will lie, or where "the suit is brought in aid of a legal right," the equitable remedy is barred "if the legal right is barred by the local statute of limitations." *Russell v. Todd*, 309 U.S. 280, 289 (1940). See also *Cope v. Anderson*, 331 U.S. 461 (1947). As the Ninth Circuit stated in the takings context, "[w]hether styled as a claim for damages or one for declaratory relief, the facial challenge is time barred." *Levald,* 998 F.2d at 688-689.

CONCLUSION

The Ninth Circuit did not err in applying the statute of limitations to petitioners' facial challenge to the City's ordinance that is the subject of this action. For the reasons stated above, the case does not meet the criteria for issuance of a writ of certiorari, and the petition for a writ should be denied.

Dated: October 6, 1997

Respectfully submitted,

JAMES K. HAHN, City Attorney
CLAUDIA McGEE HENRY,
Senior Assistant City Attorney
ANTHONY SAUL ALPERIN,*
Assistant City Attorney
**Counsel of Record*
SHARON SIEDORF CARDENAS,
Assistant City Attorney

LOS ANGELES CITY
ATTORNEY'S OFFICE

Attorneys for Respondent
CITY OF LOS ANGELES